87-1439

Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NORMAN D. REVIE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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February 1988

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QUESTIONS PRESENTED

(1) Whether 28 U.S.C. § 1654, authorizing defendants in civil cases to appear before the courts of the United States either in person or by counsel, bars the imposition of criminal contempt sanctions against a civil defendant because of his allegedly willful disobedience of an order to appear in court, when he is not explicitly directed to appear in person, and his attorney appears on his behalf?

(2) Whether the limited jurisdiction conferred by 28 U.S.C. § 157 on Article I bankruptcy judges does not empower them to order a civil defendant, not subject to subpoena, to appear in person before the bankruptcy court to show cause why he should not be found in civil contempt?

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OPINION BELOW

The opinion of the Court of Appeals is reported, *United States v. Revie,* 834 F.2d 1198 (5th Cir. 1987), and is reprinted in the Appendix at page A-1, together with the judgment and order denying petition for rehearing and suggestion for rehearing en banc.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on December 21, 1987. A timely petition

for rehearing and suggestion for rehearing en banc were filed and denied on January 29, 1988. This petition for certiorari was filed within 60 days thereafter. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 18 U.S.C.:

§ 401. Power of court

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

* * *

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Title 28, U.S.C.:

§ 157. Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to—

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purpose of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliqudated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the

debtor-credit or the equity security holder relationship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

* * *

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

* * *

§ 1654. Appearance personally or by counsel

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

STATEMENT OF THE CASE

Petitioner Norman D. Revie was adjudged in criminal contempt of court by the United States District Court for the Southern District of Texas and sentenced to six months in jail after he twice failed to appear in person before Letitia Z. Taitte, a Houston bankruptcy judge, who was attempting to impose civil contempt sanctions against him for his allegedly willful refusal to comply with her turnover order directing the production by Revie of a valuable 1879 four-dollar gold coin.[1] The contempt proceedings arose from the Chapter 11 reorganization of Revie's former employer, Shearn Moody, Jr.

The trustee had initiated a separate adversary proceeding in the bankruptcy court by filing a complaint for turnover against Revie, alleging in substance that he was the last person to have seen the coin, that it was in his possession and was property of the estate, and that under 11 U.S.C. § 542(a) he was obligated to deliver it to the trustee or to account for its value (R. 150). Revie's attorney, Louis Dugas, Jr., filed a timely answer, denying that Revie had possession of the coin (R. 146).

Revie subsequently testified in the turnover hearing before Judge Taitte that he did not have the coin, that he did not know where it was, and that he would turn it over to the trustee if he had it (R. 4: 23, 27). He also testified that he had first seen the coin many years earlier, that customarily it had been kept in a file cabinet in a storage room adjacent to his office in a house in Galveston

1. The same District Judge who punished Revie for his purported criminal contempt subsequently exonerated him of Judge Taitte's civil contempt accusation, concluding that he had demonstrated "plainly and unmistakably" his inability to produce the coin (R. 25).

owned by Moody's mother, and that he had last seen it more than six months previously, when a Dallas coin dealer had inquired about it (R. 4: 5-6, 9).

Neither Moody nor his mother testified in the turnover hearing. At least seven other people besides Revie, Moody, and Moody's mother had access to the house during the relevant period, one of whom did not testify. During the preceding year, acting under an enforcement order obtained *ex parte* from the bankruptcy court, the trustee had seized possession of the house and its contents, including the file cabinet that had contained the coin, without forewarning to either Revie or Moody (R. 4: 66, 86-87). No testimony or other evidence directly established Revie's possession of the coin or knowledge of its whereabouts.

Judge Taitte nevertheless concluded that Revie was the last person to have had custody and control over the coin, that "no plausible explanation for its subsequent disappearance has been put forth," and that Revie then had possession of it (R. 262). She ordered him personally to turn over the coin to the trustee or his counsel on a specified date and directed all parties to appear before the bankruptcy court on the day after that at what she characterized as a "compliance hearing" (R. 266).

Both Revie and his attorney, Dugas, appeared in person at the compliance hearing, at which time the trustee advised Judge Taitte that the coin had not been produced. In response to her directive (R. 5: 1), the trustee's counsel filed with the bankruptcy court a motion to have Revie adjudged in civil contempt for having failed to comply with the turnover order (R. 267). Judge Taitte signed an order scheduling a hearing on the trustee's con-

tempt motion, but it contained a significant typographical error: it directed Revie to appear before the bankruptcy court "to show cause why he should be (sic) held in contempt" for having failed to produce the coin (R. 252). Copies of the order were mailed to Revie and Dugas, and telephonic notification of the hearing date was provided to Dugas.

Revie has consistently maintained—and the claim has never been disputed by the District Court, the Court of Appeals, or the Government—that he did not receive or read the written show-cause order prior to the hearing it scheduled because, at the time it was mailed to his residence, he was in Washington, D.C., preparing for depositions in litigation in which both he and Moody were parties (Govt. Ex. 5: 20). Instead, Dugas appeared on his behalf at the show-cause hearing before Judge Taitte, advised her that he had told Revie about the hearing (but, significantly, not that he had told Revie to appear personally at the hearing), and objected to any further proceedings on the grounds that Revie had filed a timely appeal of the turnover order to the District Court, and that the pendency of that appeal divested the bankruptcy court of jurisdiction to enforce the order through civil contempt sanctions.

Rejecting this contention, and without remarking on the typographical error in the order scheduling the hearing, Judge Taitte announced her intention to give Revie "one more chance" to appear and rescheduled the hearing for six days (Supp. R. Tr. 1: 8). Dugas was not ordered to tell Revie to appear personally. An order scheduling the second hearing, and directing Revie "to appear to show cause why he should not be held in contempt" (R. 259-60) was again mailed to both Revie and Dugas,

and Dugas again received telephonic confirmation of the second hearing. Since Revie was still in Washington, D.C., he did not receive or see the second order until after the rescheduled hearing date.

At the second hearing, Dugas again appeared on Revie's behalf before the bankruptcy court and advised Judge Taitte that Revie had been told about the hearing (Supp. R. Tr. 2: 3). When Revie did not appear in person, the Judge announced that she was certifying to the District Court that Revie was in civil contempt for having disobeyed her turnover order and in criminal contempt for having twice failed to attend in person the show-cause hearings (Supp. Tr. 2: 4). Revie subsequently was arrested in Washington, confined for more than a month, eventually released on bail, and then brought to trial before the District Court on the criminal contempt charges.

Although Revie did not testify at his criminal contempt trial, the Government introduced into evidence a transcript of his previous testimony at a bail reduction hearing, in which he admitted knowing that the two hearings had been scheduled but denied that he had received or read either of the written show-cause orders that had been mailed to him. He also maintained that Dugas had told him there was a statute under Title 28 "that allowed him to represent me in the court proceedings" and that "he would handle the matter" (Govt. Ex. 5: 8, 18, 20-21). Dugas testified at the criminal contempt trial that Revie had never asked his advice, and he had never volunteered it, as to whether Revie should "show up at the contempt [hearings]" (R. 2: 64, 70), but that they had discussed Title 28:

> Q. Did you ever advise [Revie] that under Title 28, section 1654, that as his attorney you could appear in his stead?
>
> A. That was after—yes, I did. And this was after he told me he wasn't going to be here, that I would appear in his behalf in accordance with that statute. (R. 2: 82)

The District Court adjudged Revie in criminal contempt and sentenced him to jail for allegedly having willfully violated the bankruptcy court's two show-cause orders by failing to appear in person at the hearings they scheduled (R. 35). In separate orders the Court absolved Revie of civil contempt because of his inability to comply with the turnover order but dismissed his appeal from that order on the grounds that it was interlocutory and therefore not appealable.[2]

The Court of Appeals for the Fifth Circuit affirmed the criminal contempt sanctions, rejecting Revie's contention that 28 U.S.C. § 1654 authorized him to appear in the bankruptcy court by counsel in the absence of a valid, explicit directive, communicated to him, that he was obligated to appear in person:

> As is clear from the language [of § 1654], this section simply allows parties or their counsel to manage litigation; it does not, however, permit parties to disobey orders of the court. One might as well suggest that any other criminal defendant—say, one accused of bank robbery—need appear only by counsel. Revie had the right under § 1654 to have his lawyer plead and conduct his case at Judge Taitte's

2. The District Court's dismissal of the appeal was reversed by the Fifth Circuit in Smith v. Revie (In re Moody), 817 F.2d 365 (5th Cir. 1987).

> hearing. He did not have the right under this section to ignore Judge Taitte's order that Revie *appear* there.

834 F.2d at 1203 (emphasis in original).[3]

The Court of Appeals also sustained Judge Taitte's jurisdiction to issue the two show-cause orders. While recognizing there exist substantial differences of opinion among the federal courts concerning the authority of Article I bankruptcy judges to initiate, preside over, and issue commitment orders in civil contempt proceedings, the Court nevertheless concluded that "a proceeding to show cause why a turnover order had not been obeyed falls within the authority granted in 28 U.S.C. § 157. Few functions are more essential to conducting a court than maintaining order and enforcing attendance." 834 F.2d at 1206. The issue, as the Fifth Circuit viewed it, was "whether bankruptcy judges have the power, absent explicit delegation from a district court, to determine whether their orders are being obeyed." *Id.*

In a timely suggestion for rehearing en banc, Revie pointed out that the Fifth Circuit previously had held that a District Court had "no power to force a civil defendant outside its subpoena jurisdiction to appear personally at the trial and there submit to examination . . ."

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3. The Court of Appeals' comparison of Revie to "any other criminal defendant" betrays an inexplicable, fundamental misunderstanding of this case. When he allegedly disobeyed the bankruptcy court's show-cause orders, Revie was not a "criminal defendant" but an ordinary litigant in a routine civil case.

With specified exceptions, Rule 43 of the Federal Rules of Criminal Procedure provides that "[t]he defendant shall be present" at all relevant stages of the proceedings against him. There is no equivalent obligation imposed on civil defendants by the Federal Rules of Civil Procedure.

GFI Computer Industries, Inc. v. Fry, 476 F.2d 1, 5 (5th Cir. 1973).[4] Without comment, the Court denied rehearing.

REASONS FOR GRANTING THE WRIT

This case presents profoundly important questions arising from the asserted authority of an Article I bankruptcy judge, in advance of any review of her actions by an Article III court, to initiate civil contempt proceedings by ordering a supposedly disobedient litigant, not otherwise subject to the subpoena power, to appear in person before the bankruptcy court. Because the holding of the Fifth Circuit Court of Appeals on these issues is in square conflict with that of the Ninth Circuit in *Plastiras v. Idell (In re Sequoia Auto Brokers, Ltd., Inc.)*, 827 F.2d 1281 (9th Cir. 1987), and because lower federal courts have entertained a variety of conflicting views on the subject,[5] Revie's petition for certiorari should be granted.

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4. Other Courts of Appeals have reached similar conclusions. See, e.g., In re Guthrie, 733 F.2d 634 (4th Cir. 1984); Jaynes v. Jaynes, 496 F.2d 9 (2nd Cir. 1974). *cf.* Wells v. Rushing, 755 F.2d 376, 380-81 n. 5 (5th Cir. 1985) (disclaiming any intent to hold "there is an absolute requirement that a defendant in a civil case attend trial").

5. Compare, *e.g.*, Kellogg v. Chester, 71 B.R. 36 (N.D. Tex. 1987); Better Homes of Virginia, Inc. v. Budget Service Co., 52 B.R. 426 (E.D. Va. 1985), aff'd on other grounds, 804 F.2d 289 (4th Cir. 1986); In re Depew, 51 B.R. 1010 (E.D. Tenn. 1985); In re Johns-Manville Corp., 26 B.R. 919 (S.D.N.Y. 1983) with, *e.g.*, In re Continental Air Lines, 61 B.R. 758 (S.D. Tex. 1986); Tele-wire Supply Corp. v. Presidential Financial Corp., Inc. (In re Industrial Tool Distributors, Inc.), 55 B.R. 746 (N.D. Ga. 1985); Omega Equipment Corp. v. John C. Louis Co. (In re Omega Equipment Corp.), 51 B.R. 569 (D.D.C. 1985); James v. Cryts (In re Cox Cotton Co.), 24 B.R. 930 (E.D. Ark. 1982), vacated on other grounds sub nom. Lindsey v. Ipock, 732 F.2d 619 (8th Cir. 1984), cert. denied, 469 U.S. 881 (1984).

"It is a principle of first importance that the federal courts are courts of limited jurisdiction." Wright, *Law of Federal Courts* at § 7, p. 22 (4th ed. 1983). While Article III courts necessarily possess inherent contempt power, apart from any congressional grant of jurisdiction, as "a means to vindicate [their] own authority without complete dependence on other branches," *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. ____, 107 S. Ct. 2124, 2131, 95 L.Ed.2d 740, 751 (1987), the jurisdiction of Article I bankruptcy courts is exclusively a product of statute. Neither 28 U.S.C. § 157 nor 11 U.S.C. § 105(a), authorizing the issuance of "any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title," expressly confers on Article I courts the authority to entertain civil or criminal contempt proceedings. As *Sequoia Auto Brokers* persuasively demonstrates, 827 F.2d at 1288, the congressional repeal of all statutory sources of that authority in the 1984 bankruptcy amendments, following this Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), suggests strongly an intent to divest such courts of all contempt powers, rather than to retain it by implication. "It simply does not follow that 'because an official is empowered to make decisions, he must also be able to punish those who refuse to accede to them'." 827 F.2d at 1289, citing *In re Omega Equipment Corp., supra*, n. 5.

The Fifth Circuit in this case sought to differentiate between the power to impose punitive or coercive contempt sanctions and the power to initiate "a proceeding to show cause why a turnover order had not been obeyed," 834 F.2d at 1206. It is a distinction without substance. Nothing in Title 11 or Title 28 of the United States Code,

or in the Federal Rules of Civil Procedure or Federal Bankruptcy Rules, authorizes the issuance of a show-cause order as a mechanism for compelling the physical attendance of a litigant at a judicial proceeding. It may well be that such an order, like a summons or complaint, may appropriately be utilized to afford procedurally fair notice of an accusation and to permit the opportunity to respond before sanctions are imposed. *Cf. Waffenschmidt v. Mackay*, 763 F.2d 711, 720 (5th Cir. 1985) (distance limitations prescribed by Rule 4(f), F. R. Civ. P., do not preclude service of civil contempt show-cause orders beyond those limitations). But there is no authority whatever, statutory or otherwise, for a non-Article III judge to issue what amounts to a mandatory injunction, commanding a litigant, on pain of criminal contempt sanctions, to travel 1,200 miles from Washington, D.C. to Houston, simply in order to go through the hollow formality of showing "cause" that had already been erroneously rejected by Judge Taitte in the turnover hearing. Indeed, the Fifth Circuit never articulates what practical purpose Revie's physical presence before the bankruptcy court might have served, because there was none.

However characterized, the two show-cause orders Revie was convicted of violating were substantively and functionally equivalent to subpoenas. Bankruptcy Rules 7004(d) and 9016 exempt subpoenas from the general rule that process in bankruptcy cases may be served anywhere in the United States and instead make them subject to the distance limitations prescribed by Rule 45(e)(1), F. R. Civ. P.:

> (e) *Subpoena for a Hearing or Trial.*
>
> (1) At the request of any party subpoenas for attendance at a hearing or trial shall be issued by

> the clerk of the district court for the district in which the hearing or trial is held. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena, or at a place within the state where a statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place where the district court is held. Where a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place.

No Texas or federal statute would have authorized service of a subpoena issued by a bankruptcy court in the Southern District of Texas upon Revie in Washington, D.C. Accordingly, service of any subpoena, or any logically equivalent judicial order compelling physical presence in a courtroom, would have been completely outside the jurisdiction of any federal court.

The problem in this case is compounded by the fact that Revie was never "served" with either of the two show-cause orders he was accused of having willfully violated. Instead, if the Fifth Circuit's views as to what inferences may appropriately be drawn from the evidence are correct, he was told what the orders said over the telephone by his attorney. Even assuming Dugas read each of the two orders to Revie *verbatim* (and there is no evidence whatever in the record that he did), Revie still could not be found to have known he was under a legal obligation to be physically present before the bankruptcy court in Houston on the dates in question.

In light of 28 U.S.C. § 1654, which Revie and Dugas had discussed, the meaning of the word "appear" in each of the two show-cause orders is equivocal. It may mean "physical presence," as the Court of Appeals uncritically assumed it must have meant to Revie. But it may also have the meaning ascribed to it in § 1654, by the Federal Rules of Civil and Appellate Procedure, and by the decisions of this Court. See, *e.g.*, *Osborn v. Bank of the United States*, 9 Wheat. (22 U.S.) 738, 829-30 (1824) ("[n]atural persons may appear in court either by themselves or by their attorney"; per Chief Justice Marshall); Rule 4(b), F. R. Civ. P. (summons must state "the time within which these rules require the defendant to appear and defend"); Rule 23(c)(2), F. R. Civ. P. (allowing member of a class in a class action "to enter an appearance through his counsel"); Rule 71A(e), F. R. Civ. P. (defendant in condemnation proceeding may serve a "notice of appearance"); Rule 34(e), F. R. App. P. (prescribing the manner of proceeding if either party "fails to appear" for oral argument).

Neither of the bankruptcy court's show-cause orders imposed an unequivocal obligation of obedience, so as to exclude the possibility of honest misunderstanding. If the principal purposes of criminal contempt sanctions are to promote respect for the judicial process and to instill a sense of the legitimacy of exacting obedience to court orders, those commendable objectives are disserved, not advanced, by the Court of Appeals' disposition of this case. Sending Revie to jail for his alleged willful disobedience of orders as equivocal as these will accomplish nothing—except, perhaps, to remind us all of Justice Brandeis' immortal observation that "[t]he greatest dangers to liberty lurk in insidious encroachment

by men of zeal, well-meaning, but without understanding." *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (dissenting opinion).

CONCLUSION

For the foregoing reasons, Petitioner Norman D. Revie asks that his petition for certiorari be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES of America,
Plaintiff-Appellee,

v.

Norman D. REVIE,
Defendant-Appellant.

No. 86-2968.

United States Court of Appeals,
Fifth Circuit.

Dec. 21, 1987.

Before CLARK, Chief Judge, and GEE and RUBIN, Circuit Judges.

GEE, Circuit Judge:

Norman Revie appeals a decision of the district court adjudicating him in criminal contempt for willfully disobeying a show cause order issued by the bankruptcy court. We conclude that the district court was not clearly erroneous in its determination of Revie's guilt and therefore affirm.

Revie's refusal to obey an order to show cause why he did not turn over to the trustee of Shearn Moody's bankrupt estate a valuable 1879 four dollar gold coin has given rise to this appeal. As administrative assistant to Shearn Moody, Jr., Revie occupied an office in a house in Galveston formerly owned by Moody's mother. An 1879 "coiled hair 10 struck gold stella" was kept in a storage room adjacent to Revie's office. Bankruptcy Judge

Letitia Taitte Clark[1] conducted hearings and determined that Revie had possession of the valuable coin. On March 4, 1986, Judge Taitte ordered Revie to turn over personally the gold coin to the trustee of Moody's bankrupt estate by 5:00 p.m. on March 7, 1986. Revie did not comply with the order.

On March 11, 1986, Revie noticed an appeal of the turnover order, but he sought no stay of further proceedings concerning the matter in the bankruptcy court. Later, Judge Taitte ordered Revie to show cause why he should not be held in civil contempt for his failure to turn over the coin. The order directed that Revie "shall appear" before the bankruptcy court on April 16, 1986 at 2:00 p.m.[2]

Although Revie contends that he did not receive written notice of the hearing until several months later, his attorney, Louis Dugas, received timely telephone notice of the hearing from the bankruptcy court's clerk. At the trial for criminal contempt, Dugas testified that he in-

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1. Elsewhere throughout this opinion Judge Clark will be referred to by the surname she held throughout the matters involved in this appeal and before her recent marriage.

2. This first Order to Show Cause stated that:
Norman D. Revie shall appear at 2:00 o'clock p.m. in Court #3 on the 16th day of April, 1986 to show cause why he should be held in contempt [sic] for failure to comply with this Court's Decision and Order on Complaint to Compel Turnover of Property, entered on March 4, 1986, which specifically ordered Norman D. Revie to turn over personally the 1879 "Coiled Hair 10 Struck" coin personally to W. Steve Smith, Trustee or his counsel on or before 5:00 p.m. on March 7, 1986.
It is noteworthy that this Order failed to insert a "not" at a critical place in the order: it should have directed Revie to show cause "why he should *not* be held in contempt." This error, however, was remedied in the second Order to Show Cause issued on April 16, the day Revie failed to appear in response to the first order.

formed Revie of the hearing by phone. When he spoke with his client, Dugas neither knew where his client was nor advised Revie whether or not he should appear for the hearing. In fact, at the time of the conversation Revie was attending depositions of his former employer, Shearn Moody, Jr., in Washington, D.C. On April 14th, lawyers at the deposition hearing attempted to accommodate Revie's schedule, noting that the examination involving Revie could commence at a time that did not conflict with Revie's obligation to be in Houston on April 16 for the contempt hearing.[3]

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3. The record indicates that Dugas received a telephone call from Revie the day before April 16, 1986, at which time Dugas discussed with Revie for the first time the contempt proceeding in Houston. Record II:63. At trial, Dugas suggested that Revie already had notice of the hearing:

> Q. So, during your conversation on what you believe to be the day before April 16th, did Mr. Revie tell you that he knew about the order requiring his appearance on April 16?
>
> A. We talked about it, so I assumed that from our conversation he knew about it.
>
> Q. Tell us what you remember about the conversation?
>
> A. I remember very little about the first conversation. And I, as I said just a moment ago, assumed that Mr. Revie would be there on the 16th.
>
> Q. So, at the end of that conversation, it was basically left that you were going to meet him there at Judge Taitte's courtroom the morning of the 16th, then?
>
> A. That was my understanding.

Record II:64.

If Dugas did talk with Revie for the first time on April 15 regarding the hearing, then Revie had prior notice of the hearing from another source, as demonstrated by the fact that attorneys at the Washington deposition discussed the matter with Revie on April 14. The date of Dugas's conversation with Revie is unclear, however, because of statements made by Dugas at the April 16 hearing indicating that he spoke with Revie about the hearing set for April 16 the day after the court clerk called Dugas to notify him of the hearing. The record indicates that the court clerk made the telephone call to Dugas on April 8.

Revie did not attend the contempt hearing. In response to Judge Taitte's inquiry as to Revie's absence at the hearing, Dugas indicated that he did not know why Revie was absent. Judge Taitte issued a second Order to Show Cause commanding Revie's appearance on April 22, 1986.[4] Revie failed to appear for the second time, and Judge Taitte certified facts to the district court supporting a finding of criminal contempt against Revie. The district court judge issued orders for Revie's appearance on May

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4. The second order states in pertinent part:

ORDER TO SHOW CAUSE

"By previous Order to Show Cause entered on April 7, 1986, Norman D. Revie was ordered to appear on April 16, 1986, to show cause why he should not be held in contempt for failure to comply with this Court's Order of March 4, 1986, ordering him to turn over to the Trustee valuable property of the estate, to wit, a rare gold coin.

"Although duly notified by telephone and served by mail with the April 7, 1986 Order to Show Cause, Norman Revie *failed to appear before the Court* on April 16, 1986.

"At the hearing on April 16, 1986, in view of the seriousness of any finding of contempt for violation of an order of turnover in bankruptcy proceedings, the Court set an additional hearing to provide Norman D. Revie one more chance to appear to show cause why he should not be held in contempt. The date and time were announced in court at the hearing on April 16, 1986. It is therefore

"ORDERED that Norman D. Revie shall appear at *8:30 a.m.* o'clock in Court #3 on the 7th Floor of the U.S. Courthouse, 515 Rusk Avenue, Houston, Texas, on the *22nd day of April, 1986* to show cause why he should not be held in contempt for failure to comply with this Court's Decision and Order on Complaint to Compel Turnover of Property, entered on March 4, 1986, which specifically ordered Norman D. Revie to turn over *in person* the 1879 "Coiled Hair 10 Struck" gold coin to W. Steve Smith, Trustee or his counsel on or before 5:00 p.m. on March 7, 1986."

At the hearing on April 16, 1986, in view of the seriousness of any finding of contempt for violation of an order of turnover in bankruptcy proceedings, the Court set an additional hearing to provide Norman D. Revie *one more chance* to appear to show cause why he should not be held in contempt (emphasis added).

15 and again June 11, 1986. Revie appeared for neither hearing, and an order for his arrest issued.

A United States Marshal in Washington, D.C. went to the hotel where Revie was reported to be having lunch between 1:00 and 2:00 p.m. on July 17, 1986. The Marshal approached the table where Revie was seated, made inquiries, and returned to the registration desk to check a room registration. Upon returning to the dining room, the Marshal noticed that the suspect had decamped. A chase ensued and Revie was apprehended.[5]

The district court adjudicated Revie guilty of criminal contempt for willfully disobeying the order to show cause and sentenced him to incarceration for a period of six months. Revie appeals this judgment of the district court.

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5. The Marshal vividly sketched the chase at trial:
I went back into the dining area and noticed that the plate was still half-full of food but the two subjects had left. The hotel is located in such a way that the only exit for the public is located, you have to go through the lobby. I asked some of the hotel workers had they seen the white gentleman sitting there. They said: Yes, that he had left and gone through the back door. At that time, I proceeded through the back door, through a maze of corridors through the kitchen area and I exited the hotel on F Street in the fourteen hundred block. I looked across the street and I saw the subject that I had questioned earlier at the table running around the back of a pickup truck. The other individual, the white male subject that was sitting there, the younger one, was getting in the driver's side. The subject that was running around the back of the truck didn't see me, but I hollared [sic] across the street: "Freeze." At which time the subject threw—stopped suddenly and threw both his hands up in the air.
I went across the street, grabbed him by the back of his pants and brought him back around to the front of the hotel. In the lobby, where my partner had returned from upstairs after checking out the other individual. We frisked the subject, found a wallet on him, placed him under arrest, put him in the back of our car and transported him to the United States Courthouse. In his wallet was the identification with the name of Norman Revie.

Issues on Appeal

Revie argues that the district court erred in its finding of guilt beyond a reasonable doubt. Appellant also maintains that Judge Taitte lacked jurisdiction to issue the show cause orders and thus that his criminal contempt conviction must be vacated.

1. Guilt.

[1, 2] In order to convict of criminal contempt for failure to appear at a show cause hearing, the government must prove beyond a reasonable doubt that the contemnor had notice of a specific order to appear and willfully disobeyed the order. *United States v. Rylander*, 714 F.2d 996 (9th Cir. 1983); *In re Rumaker*, 646 F.2d 870, 872 (5th Cir. 1980); *In re Weeks*, 570 F.2d 244, 245 n. 1 (8th Cir. 1978). Appellant argues that because Judge Taitte's two orders did not direct him to appear "in person" the orders were not specific. This argument lacks merit.

Determining whether or not an order is specific requires a factual inquiry into the reasonableness of the order's specificity, given the context in which it was issued. *United States v. Turner*, 812 F.2d 1552, 1565 (11th Cir. 1987). Judge Taitte had issued an initial show cause order setting a hearing for April 16, 1986, that appellant disobeyed. To give appellant a final opportunity to attend the show cause hearing, Judge Taitte set another for April 22. It is clear that her concern for the seriousness of the sanction that Revie could face for disobeying the initial order led her to schedule the second hearing. This concern of the bankruptcy judge was not only communicated orally by Judge Taitte to Mr. Dugas at the hearing

on April 16 but was also put *in writing* in the second Order to Show Cause. Revie's counsel contended at oral argument that Revie should not be expected to divine the conversation between Judge Taitte and Dugas in which Judge Taitte made *clear* her desire that Revie personally attend the second hearing, maintaining that because Judge Taitte's comments were not contained in the second order Revie had no notice that he was required to appear personally. The second order did contain Judge Taitte's command that Revie appear in person when it stated "the court set an additional hearing to provide Norman D. Revie one more chance to appear to show cause why he should not be held in contempt."[6] Any possible confusion regarding whether or not Revie had to appear "in person" was clarified by Judge Taitte's statement in her second order that Revie's absence would be tolerated only once, and thus that "appearance" by counsel—which had already occurred—did not suffice.

The district court determined that Revie had knowledge of both the first and second show cause orders and willfully disobeyed them. "In fact, Revie himself came to an independent decision that Judge Taitte was without authority to issue the show cause orders. Thus, there is not even the slightest doubt that Revie had the requisite notice of Judge Taitte's orders to comport with the requirements of due process." We must review the factual findings of the trial court under the clearly erroneous standard, considering the evidence in the light most favorable to the government. *United States v. Baker,* 641 F.2d 1311, 1317 (1981).

At each of the show cause hearings, Revie's counsel indicated that he did not know why his client had failed

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6. See, *supra,* note 4.

to appear.[7] When asked at trial why Revie did not appear at the April 22 hearing, Revie's counsel responded, "This may be just memory, but I got the impression that he was afraid he would be thrown in the jail." On Monday, April 14, two days before the first show cause hearing, Revie stated to lawyers in Washington that Judge Taitte lacked jurisdiction to issue the show cause order. This statement indicates, as the trial judge concluded, that Revie had made an independent decision that Judge Taitte lacked authority to issue the show cause order.

Any confusion regarding whether Revie had to appear in person at the April 16 hearing was clarified in the second order. Revie's counsel urged us at oral argument to review only two statements at trial that purportedly indicate clearly Revie's lack of knowledge regarding his obligation to appear personally before Judge Taitte's court: (1) Dugas stated that he did not recall whether he had advised Revie that he was required to appear on April 22; (2) after Revie told Dugas he would not attend, Dugas told Revie that he would appear on his

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7. The transcript of the April 16 hearing included the following statements:

> The Court: All right, Mr. Dugas, I don't see the defendant Norman Revie present in the courtroom.
>
> Mr. Dugas: He should be arriving, Your Honor.
>
> The Court: What do you know about his failure to appear?
>
> Mr. Dugas: I don't know. I talked with him when I got the telephonic message about the court's order. And that's the last contact I have had with Mr. Revie.

The transcript of the April 22 hearing contains the following exchange:

> The Court: Mr. Dugas, I see Mr. Revie is not present. Do you expect him this morning?
>
> Mr. Dugas: I don't know, Your Honor.
>
> The Court: What contact have you had with him?
>
> Mr. Dugas: I talked with him over the phone.
>
> The Court: And was he aware of today's proceedings?
>
> Mr. Dugas: Yes.

behalf in accordance with 28 U.S.C. § 1654. Whether Dugas advised Revie that he had to obey a clear court order is not determinative of whether Revie had knowledge of the order. In order to conclude, as Revie's counsel urges us to do, that Revie could not be found to have had knowledge of the order "beyond a reasonable doubt" we would be required to deny the use of circumstantial evidence to find guilt in criminal contempt cases. Under such a prescription, unless a witness could testify to having overheard the conversation between attorney and client when the attorney notified his client of a court order, many contemnors would go free based upon the testimony of their attorneys that no advice had been given regarding whether the client should obey the order. There can be no doubt that an attorney of Mr. Dugas' experience well knew that Revie's personal presence was ordered, and the inference that he would—as clearly he should—have acquainted Revie with this critical knowledge is a compelling one.

The second part of the record highlighted by Revie's counsel at oral argument does not demonstrate that Revie did not have knowledge of Judge Taitte's order. It simply indicates that Revie made a decision to not attend the hearing and to send his counsel to appear at the hearing to argue on his behalf. Two inferences can be drawn from the statement: (1) Revie simply misunderstood that he had an obligation to appear in person; (2) Revie decided he was going to disobey the order, and his counsel made assurances that, at the least, he was entitled to argue on behalf of Revie's interests at the hearing, which counsel did. The trial judge would not be clearly erroneous in attaching the second significance to this testimony. Based upon the record evidence and inferences

discussed above, we do not find that the district court was clearly erroneous in its determination that Revie had knowledge of the second show cause order.

Revie also maintains that, even if the order was specific, he was entitled to have his counsel appear in his stead. Revie asserts that 28 U.S.C. § 1654 permits such a proxy.

> In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein. 28 U.S.C. § 1654.

As is clear from the language, this section simply allows parties or their counsel to manage litigation; it does not, however, permit parties to disobey orders of the court. One might as well suggest that any other criminal defendant—say, one accused of bank robbery—need appear only by counsel. Revie had the right under § 1654 to have his lawyer plead and conduct his case at Judge Taitte's hearing. He did not have the right under this section to ignore Judge Taitte's order that Revie *appear* there.

Appellant cites an opinion by Chief Justice John Marshall for the claim that "Natural persons may appear in Court, either by themselves, or by their attorney." *Osborn v. Bank of the United States*, 9 Wheat. (22 U.S.) 738, 829-30, 6 L.Ed. 204 (1824). Taken out of context, this principle might appear to apply in the case before us. The issue in *Osborn*, however, was an archaic one in which the appellant challenged the failure of the court below to observe a formality: because a warrant of attorney under a corporate seal was not produced in a case involving a corporate party, appellant asserted that the

decree of the Circuit Court was erroneous. Chief Justice Marshall discussed the unique problem of representation (appearance) on behalf of corporations in an action:

> It is admitted that a corporation can only appear by attorney, and it is also admitted, that the attorney must receive the authority of the corporation to enable him to represent it. It is not admitted that this authority must be under seal.

This passage brings to light the context in which the Chief Justice asserted that "[n]atural persons may appear in Court, either by themselves, or by their attorney." The issue was whether the failure to introduce a warrant of attorney under the corporate seal in the prior record was reversible error, not whether the appearance of an attorney on behalf of a person who has been directed by court order to appear for a show cause hearing suffices.

Appellant also cites a recent case from our Circuit holding that a litigant may "appear" by counsel in a civil proceeding without being physically present. *Broadcast Music, Inc. v. M.T.S. Enterprise, Inc.*, 811 F.2d 278 (5th Cir. 1987). In *Broadcast Music*, the court concluded that appearance by counsel on behalf of the clients waived their defense of failure of service of process under Fed. R. Civ. P. 12(h)(1). The case does not address whether appearance of counsel is sufficient to satisfy a specific court order commanding a client's presence at a hearing, and to cite it for such a proposition borders on the disingenuous.

Courts must have control over parties in order to conduct hearings. A party who is fearful that his failure to comply with a turnover order will lead to his incarceration for civil contempt would naturally be less

than eager to appear at a hearing being held to underscore his noncompliance. Revie's attorney indicated as much when he testified that it was his impression Revie decided not to attend the second show cause hearing because "he was afraid he would be thrown in jail." Upon order of the court to appear, however, the party must attend or face charges of criminal contempt. Revie knowingly risked the latter sanction, and the district court did not clearly err in imposing it.

2. Jurisdiction.

Revie contends that the bankruptcy judge lacked jurisdiction to order his appearance at the show cause hearing. He argues in this regard: (1) his notice to the district court appealing Judge Taitte's turnover order divested her court of jurisdiction to issue the show cause orders; (2) bankruptcy courts lack jurisdiction *in general* to issue show cause orders without approval of the district court.

a. Effect of Notice of Appeal.

[3, 4] Revie argues that his timely appeal of the turnover order divested the bankruptcy court of "its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S. Ct. 400, 402, 74 L.Ed.2d 225 (1982). In general, disobedience of invalid court orders may be punishable on contempt grounds. *Walker v. City of Birmingham*, 388 U.S. 307, 87 S. Ct. 1824, 18 L.Ed.2d 1210 (1967). An important exception to this rule arises when the issuing court lacks jurisdiction to give the order; in such circumstanses, a party may willfully disobey the order without fear of contempt sanction. *Howat v. Kansas*,

258 U.S. 181, 189-90, 42 S. Ct. 277, 280-81, 66 L.Ed. 550 (1922). Our Circuit has upheld this exception on several occasions. In *United States v. Holland*, 552 F.2d 667, 674-75 (5th Cir. 1977), we ruled that a person could not be held in criminal contempt for refusing to furnish handwriting samples when the district court commanding compliance lacked jurisdiction over any proceeding involving the party. Similarly, our Court noted in *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972):

> Of course, the rule that unconstitutional court orders must nevertheless be obeyed until set aside presupposes the existence of at least three conditions: (i) the court issuing the injunction must enjoy subject matter and personal jurisdiction over the controversy. . . .

465 F.2d at 511.

Revie notes that this jurisdictional exception to the general rule allowing contempt proceedings for disobedience of invalid court orders has, in itself, an exception. "Pending a decision on a doubtful question of jurisdiction, [a court has] power to maintain the *status quo* and punish violations as contempt." *United States v. United Mine Workers*, 330 U.S. 258, 292, 67 S. Ct. 677, 695, 91 L.Ed. 884 (1947); *National Maritime Union v. Aquaslide 'N'Dive Corp.*, 737 F.2d 1395 (5th Cir. 1984). Revie maintains that the exception applies strictly to situations in which the court is attempting to maintain the status quo through prohibitory judicial decrees, such as preliminary injunctions.

We need not pass judgment on Revie's careful argument set forth above, for it is his initial contention that

wants authority. Whereas the Supreme Court stated in *Griggs* that a district court loses control of aspects of a proceeding involved in an appeal, the court did not address the scope of its general rule. For many years, case law in our Circuit has recognized that a court maintains continuing jurisdiction to enforce a judgment. Until the judgment has been properly stayed or superseded, the district court may enforce it through contempt sanctions. *Farmhand, Inc. v. Anel Engineering Industries*, 693 F.2d 1140, 1145-46 (5th Cir. 1982); *Brown v. Braddick*, 595 F.2d 961, 965 (5th Cir. 1979). In *Farmhand*, we ruled that the district court retained jurisdiction to supervise its injunction in a patent infringement action if no stay of the injunction had been granted. *Farmhand* relied on our Court's ruling in *Braddick*, which sustained jurisdiction of the district court to hold civil contempt proceedings despite appeal of the district court's judgment.

> Since Braddick failed to ask the district court for a stay pending appeal and to post supersedeas bond as required by F.R.C.P. 62(d), the district court retained power to enforce its order by civil contempt proceedings.

595 F.2d at 965.

In the bankruptcy setting, the rules related to seeking a stay of a proceeding pending appeal (Rules 7062 and 8005) make F.R.C.P. 62(d) applicable with respect to judgments and contested matters. If a district court retains power to enforce its judgments subject to a stay's being issued pursuant to F.R.C.P. 62(d), it must follow that a bankruptcy court retains the similar power to hold a hearing to determine if its order is being obeyed. We do not hold that a bankruptcy court has the power to make

an adjudication of contempt; this issue is presently unresolved and is discussed below. Under the holdings of *Farmhand* and *Braddick*, however, we rule that a bankruptcy court retains jurisdiction to conduct proceedings intended to enforce a turnover order until such time as the enforcement of the order has been stayed.

b. Validity of Show Cause Orders.

[5] In the alternative, Revie contends that even if Judge Taitte maintained jurisdiction to enforce her turnover order, she did not have jurisdiction to *initiate* contempt proceedings as a mechanism for enforcing the order. Rather, Judge Taitte had authority only to certify the fact of Revie's noncompliance to the district court. The district court would then determine whether contempt proceedings were appropriate, given that the merits of the case had been appealed.

Revie correctly notes that the case law in this area reflects great uncertainty regarding the authority of Article I bankruptcy courts to adjudicate cases of civil contempt. A month after Judge Taitte issued her second order to show cause, a federal district court in Texas held that a bankruptcy court has no authority to enter a final finding of civil contempt. *In re Continental Air Lines*, 61 B.R. 758, 773-75 (S.D. Tex. 1986). Instead, it concludes, the Article I judge is limited to certifying findings of fact and conclusions of law to the district court pursuant to 28 U.S.C. § 157(c)(1); the Article III court may then make a *de novo* determination of whether the contempt sanction is appropriate. More recently, another federal district court in Texas has disagreed with the *Continental* holding. In *Kellogg v. Chester*, 71 B.R. 36, 37 (N.D. Tex. 1987), the court held that the power

of contempt may constitutionally be granted to bankruptcy judges "and accordingly that civil contempt is a core matter within section 157."[8]

The issue addressed in *Continental* and *Kellogg* is beyond our concern in this case.[9] Revie did not violate a final civil contempt ruling of the bankruptcy judge; rather, he willfully disobeyed a show cause order. Judge Taitte issued two orders to show cause in order to assess whether or not Revie should be found in civil contempt for failure to turn over the gold coin. Whether adjudication of that assessment could be made by the bankruptcy judge or after *de novo* review by a district court judge is not determinative of the outcome in this case. We need decide only the narrow issue of whether bankruptcy judges have the power, absent explicit delegation from a district court, to determine whether their orders are being obeyed.

Revie maintains that Judge Taitte did not have the authority to conduct the show cause hearings. He urges us to hold that, because adjudication of contempt is not a "core proceeding," initiation of any hearing whatever related to a contempt finding is beyond the jurisdiction of the bankruptcy court. The Bankruptcy Code does not place such a shackle on the wrists of Article I judges. 28 U.S.C. § 157(b) allows bankruptcy judges to enter

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8. 28 U.S.C. § 157 provides that:
Bankruptcy judges may hear and determine all cases under title 11 and all *core proceedings* arising under title 11. . . . (emphasis added).
The section sets forth a nonexclusive list of matters that are core proceedings. The power of contempt is not among the matters listed.

9. The *Kellogg* case indicates that the important matter of whether bankruptcy courts have authority to make contempt rulings will be settled soon by proposed Bankruptcy Rule 9020, in which Congress will explicitly grant that authority in specified circumstances.

judgments in "core proceedings;" 28 U.S.C. § 157(c) instructs that in non-core proceedings, related to a case under title 11, bankruptcy judges may submit proposed findings of fact and conclusions of law to the district court. In *both* situations the statute provides that bankruptcy judges "may hear" proceedings. The statute does *not* say that bankruptcy judges may "hear only" when told to do so by district court judges. Once the district court provided that a bankruptcy judge would hear Shearn Moody's case (28 U.S.C. § 157(a)), the bankruptcy judge had authority to hear a proceeding related to the case. A proceeding to show cause why a turnover order had not been obeyed falls within the authority granted in 28 U.S.C. § 157. Few functions are more essential to conducting a court than maintaining order and enforcing attendance.

After exhausting the legal arguments in his brief, Revie asserts that the show cause hearings were unnecessary: "All [Judge Taitte] need have done was to certify the fact of Revie's noncompliance to the district court. Had she done so, an altogether incredible waste of judicial time and resources might have been avoided." Although frustration with judicial process may, at times, elicit sympathy from us, this contention of Revie's can only be weighed as mocking irony. The "incredible waste of judicial time" in this matter lies not with Judge Taitte's orders; it lies with Revie's recalcitrance in the face of such repeated orders.

The decision of the lower court finding Revie guilty of criminal contempt is

AFFIRMED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-2968

D.C. Docket No. CR-H-86-275

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

NORMAN D. REVIE,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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Before CLARK, Chief Judge, GEE and RUBIN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

December 21, 1987

ISSUED AS MANDATE:

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-2968

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

NORMAN D. REVIE,
Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion 12/21/87, 5 Cir., 198__, ____F.2d____)

(January 29, 1988)

Before CLARK, Chief Judge, GEE and RUBIN, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on re-

hearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ THOMAS GIBBS GEE
United States Circuit Judge